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REGULATION OF WATER CARRIERS BY THE INTERSTATE COMMERCE COMMISSION

LAWS designed to regulate transportation have until recently been based on the unexpressed major premise of a railroad monopoly. But the emergence of motor carriage and the renaissance of water carriage have compelled legislators to recognize that transportation has to a high degree become a competitive industry. In 1935, to supplement its jurisdiction over railroads and pipelines, the Interstate Commerce Commission was vested with control over the rapidly expanding motor carrier industry.¹ The Transportation Act of 1940,² designed to round out the Commission's jurisdiction over the com-

1. 49 STAT. 543 (1935), 49 U. S. C. §§ 301-27 (Supp. 1938). See Comment (1936) 36 COL. L. REV. 945. The Interstate Commerce Act, 24 STAT. 379 (1887), 49 U. S. C. §§ 1-27 (1934), established the Interstate Commerce Commission and gave it power to regulate railroads and those common water carriers entering into through routes with railroads. The Hepburn Act, 34 STAT. 584 (1906), 49 U. S. C. § 1(3) (1934) vested the Commission with control over oil pipe lines.

2. Pub. L. No. 785, 76th Cong., 3d Sess. (Sept. 18, 1940). The Act is an omnibus bill amending various sections of Part I of the Interstate Commerce Act which pertains to railroad regulation, and of Part II which provides for regulation of motor carriers. It adds a new Part III dealing with water carriers, the part with which this Comment is chiefly concerned. The Interstate Commerce Commission has announced that the administrative work under Part III will for the most part be handled by its existing bureaus; a separate Bureau of Water Carriers will, however, have charge of the determination of exemptions and the issuance of certificates and permits. C. C. H. Federal Carriers

peting units in a revolutionized industry, invests the ICC with almost complete power over transportation by water.

Though water carriers for many years have had to comply with governmental standards in navigation, equipment, and safety of operations,³ there has been only piecemeal control over their relations with the shipping public. Beginning in 1916,⁴ legislation empowered the United States Shipping Board to regulate intercoastal, coastwise and Great Lakes' common carriers by suspending unreasonable or discriminatory charges and substituting maximum rates therefor, and by approval of conference agreements designed to prevent disastrous rate wars. Repeated failures of these latter attempts at self-regulation⁵ led Congress in 1938 to vest minimum rate power over both intercoastal and coastwise common carriers in the Board's successor, the Maritime Commission,⁶ but not over common carriage on the Great Lakes. The Interstate Commerce Commission also had a measure of control over the competitive relations of water carriers; it could require the establishment of through routes and joint rates with the railroads,⁷ and it regulated water carriers owned or controlled by competing railroads.⁸ In addition, sporadic efforts at regulation were made by several of the states.⁹ But this patchwork regulation left contract carriers operating coastwise, on the Great Lakes and on inland waters, common carriers on inland waters, and private carriers in general relatively free from restraints.¹⁰

Service, ¶ 14,101 (1940). The major sections of the Act are to take effect on March 1, 1941. C. C. H. Federal Carriers Service, ¶ 14,107 (1940).

It is to be noted that the airlines still remain outside the jurisdiction of the Commission. See 84 CONG. REC. 6147 (1939).

3. Since 1784 various Congressional Acts have established these standards. For a collection of the Acts see 46 U. S. C. §§ 1-800 (1934) and 33 U. S. C. §§ 1-950 (1934).

4. The Shipping Act of 1916, 39 STAT. 728 (1916), 46 U. S. C. §§ 801-842 (1934), as amended by the Merchant Marine Act of 1920, 41 STAT. 988 (1920), 46 U. S. C. §§ 861-889 (1934), and the Intercoastal Shipping Act of 1933, 47 STAT. 1425 (1933), 46 U. S. C. §§ 844-848 (1934).

5. See Bettman, *The United States Intercoastal Shipping Conference* (1933) 12 HARV. BUS. REV. 116. The conferences failed both because of internal dissension and external forces such as the competition of industrial and foreign carriers.

6. 52 STAT. 964 (1938), 46 U. S. C. §§ 845a-845b (Supp. 1938), amending the Intercoastal Shipping Act of 1933, 47 STAT. 1425 (1933), 46 U. S. C. §§ 844-848 (1934) which had given the Shipping Board power to suspend specific rates but not to set minimum rates for intercoastal common carriers (defined to include contract carriers). See LOCKLIN, *ECONOMICS OF TRANSPORTATION* (1938) 727. The Merchant Marine Act of 1936, 49 STAT. 1987 (1936), 46 U. S. C. § 1114(a) (Supp. 1938), had transferred all the Board's powers to the Maritime Commission.

7. See note 1 *supra*.

8. Panama Canal Act of 1912, 37 STAT. 566 (1912), 49 U. S. C. § 5(19)-(21) (1934).

9. Thirty-two states and the District of Columbia have laws regulating in various degrees water carrier rates and practices in intrastate commerce. See Eastman, *Regulation of Transportation Agencies*, SEN. DOC. NO. 152, 73d Cong., 2d Sess. (1934) 158.

10. The geographical expanse of the industry covers various combinations of intercoastal, coastwise, Great Lakes, river, and canal carriage. Within each system, more-

Uninhibited by federal regulation, the business of water transportation expanded enormously in the post-war period.¹¹ Vast public expenditures for waterway improvements¹² enabled the water carrier industry to get a substantial foothold in the transportation market. But it was not until the depression that railroad management and labor realized the existence of a formidable rival in the water carrier, and called for its regulation.¹³ In a transportation system which had undergone a metamorphosis from one monopoly to a scheme of competition, the railroads could logically argue that either they should be unleashed to meet their new competitors on even terms or else that these competitors should be made to conform to a common set of rules.¹⁴ The railroads, moreover, were not alone in their complaint; the Commission had found difficulty in reconciling the interests of a regulated railroad industry with those of an unregulated and subsidized¹⁵ water carrier industry, and had repeatedly suggested uniform federal regulation.¹⁶ Moreover, several of the

over, the carriage is generally classified as common, contract, and private: the common carrier holding itself out to serve the public for reasonable compensation; the contract carrier picking and choosing its customers on its own terms; the private carrier transporting the goods of its owner. Nevertheless, because of the peculiar nature of the industry, it is not unusual for one carrier to assume the functions of any two or three of these types of carriage. See Eastman, *supra* note 9, at 6, 7.

11. Water traffic has increased tremendously since 1920. For example, intercoastal trade via the Panama Canal grew from 1,372,000 long tons in 1921 to 10,490,000 long tons in 1930; coastwise domestic trade increased from 47,260,000 net tons in 1920 to 117,821,000 net tons in 1930 and Ohio river traffic from 9,302,000 net tons to 22,337,000 net tons. See 45TH ANN. REP. ICC (1931) 98-99.

12. Of the unadjusted total of three billion dollars (including amounts attributable to non-navigable purposes such as flood control) which the Federal Government has expended on river and harbor improvements within the United States as of June 30, 1936, 77% has been made available since 1910, 64% since 1920, and 33% since 1932. The Mississippi river system has received about one-half of this total. See 3 PUBLIC AIDS TO TRANSPORTATION (Fed. Coord. of Transp. 1939) 11, 12. These expenditures were made partly to compensate for recurring railroad car shortages, partly to meet a public demand for a cheaper form of transportation, and partly to effectuate a policy of forcing rail rates down through the encouragement of water competition. *Id.* at 11.

13. The railroads were late in recognizing water and motor carriers as serious rivals in the transportation market. Shrinkage in the volume of railroad traffic attributable to the low level of business activity during the depression years, however, precipitated a "railroad problem," whose solution railroad leaders sought in the regulation of competing modes of transportation. See *Hearings before Committee on Interstate and Foreign Commerce on H. R. 2531*, 76th Cong., 1st Sess. (1939) 1702-1705.

14. See Eastman, *Fourth Report of the Federal Coordinator on Transportation Legislation*, H. R. Doc. No. 394, 74th Cong., 2d Sess. (1936) 14.

15. The water carrier has a decided cost advantage over other forms of transportation because it does not need to contribute to the upkeep of its highway. For discussion, see p. 667 *infra*.

16. As early as 1888 the Commission had recommended complete water carrier regulation. See 53D ANN. REP. ICC (1939) 25. After the Federal Coordinator had recommended such regulation in 1934 (EASTMAN, *supra* note 9, at 11), the Commission reiterated the demand in its annual reports through 1939. Without comprehensive author-

water carriers themselves had sought regulation as a possible solution for the discriminatory practices and recurrent rate wars within the industry.¹⁷ Rebates to large shippers by contract and private carriers not only prejudiced small shippers but also made precarious the position of the common carrier;¹⁸ rate-cutting and over-tonnaging in the trade exhausted the financial resources of many carriers, made it impossible to enlist the support of private capital to replace over-aged ships, and left most of the industry in a depressed state.¹⁹

The present Act seeks to meet these diverse needs by granting broad powers to the Interstate Commerce Commission, enabling it to regulate the relations of the carriers both among themselves and with the shipping public. In the nature of a preamble to the whole body of interstate commerce law the Act proclaims a "National Transportation Policy" by which the Commission is expected to regulate fairly and impartially all forms of transportation subject to its jurisdiction so as to preserve the inherent advantages of each, to promote an adequate, economical and efficient service, and to prevent unfair and destructive competitive practices. It is the purpose of this Comment to analyze the provisions of the Act dealing with water carriage against the background of the problems of the industry, and to indicate how the Commission may be expected best to effectuate this sweeping Congressional mandate.

Limits of Regulation. Although it is axiomatic that the common carrier upon whom the public depends for regular service must be held to a high degree of responsibility,²⁰ in the water transportation industry it is the common carrier which has suffered most from the destructive competitive practices of its fellow contract and private carriers.²¹ It is not surprising, therefore, to discover that the provisions of the Act manifest a clear intent on the part of Congress to establish a responsible and economically secure common carrier service.

A common carrier engaged in interstate commerce²² is defined as "any person which holds itself out to the general public to engage in transporta-

ity over water carriers, it has been extremely difficult for the Commission to decide cases involving competing rail and water lines. See Eastman, *supra* note 14, at 12-13; Sugar Cases of 1933, 195 I. C. C. 127, 131 (1933).

17. See Eastman, *supra* note 9, at 169. In general, the contract and private carriers have been opposed to federal regulation.

18. See Eastman, *supra* note 9, at 11.

19. See Eastman, *supra* note 9, at 11, 102. It must be noted that not all sections of the industry suffer from each of the competitive malpractices described above. The Act, however, treats the whole industry as a unit.

20. See note 23 *infra*.

21. See Eastman, *supra* note 14, at 14.

22. Section 302(i) defines "transportation in interstate or foreign commerce" as transportation of persons or property from one state to another or from a foreign country to the United States insofar as such movement takes place within the United States. § 303(j) expressly excludes intrastate transportation from the operation of the Act; § 303(k) makes the so-called *Shreveport* doctrine (*Houston, E. & W. T. Ry. v. United*

tion by water . . . for compensation.”²³ Administration of a similar definition in the Motor Carrier Act²⁴ indicates that the Commission will have much leeway in classifying common carriers. Thus, it will probably not exclude an applicant from the common carrier category because he accepts only specified types of commodities,²⁵ because common carriage is not his full-time occupation and he hauls only when his duties in connection with his other business permit,²⁶ because he does his business by contract,²⁷ or even because he purchases the commodity from the shipper with his own funds and delivers it to the customer at a price in excess of the cost to him.²⁸ This expanded definition seems especially desirable in view of the need for abundant services capable of satisfying varying public requirements.

Because of the broad definition of the common carrier, the term “contract carrier” is closely restricted to those agencies which do not hold themselves out to the general public but which, on the contrary, ship “under individual contracts and agreements.”²⁹ Furthermore, since the Act exempts from regulation all those contract carriers whose operations are not in competition with common carrier service,³⁰ it would seem that the class of contract carriers which actually will be regulated may be surprisingly small, namely, those contract carriers whose competitive practices — if left unregulated — might jeopardize common carrier service.

Unlike the Motor Carrier Act, the present Act fails to define the term “private carrier.”³¹ In fact, although the original draft of the Act provided for the registration and limited regulation of private carriers so as to prevent their encroachment upon the business of common or contract carriers,³² the Act in its final form requires the Commission to grant these carriers revocable

States, 234 U. S. 342 (1914), whereby the Commission may change any intrastate railroad rate which discriminates against interstate commerce) inapplicable to water carrier regulation. In administering the Motor Carrier Act, however, the Commission has claimed jurisdiction over intrastate movements which are interstate in character. See Rush Common Carrier Application, 17 M. C. C. 661 (1939).

23. § 302(d). This is essentially the common law definition of a common carrier. See *Propeller Niagara v. Cordes*, 21 How. 7, 22 (U. S. 1858). Section 305(a) indicates that the carrier may restrict his “holding out” to specific commodities or classes of commodities; it is only these services which the carrier is under a common law and statutory duty to furnish upon reasonable request.

24. Motor Carrier Act, § 203(a)(14).

25. See *Slagle Contract Carrier Application*, 2 M. C. C. 127 (1937).

26. See *Patman Contract Carrier Application*, 2 M. C. C. 194 (1937).

27. See *Beatty Contract Carrier Application*, 1 M. C. C. 141 (1936).

28. See *Carpenter Common Carrier Application*, 2 M. C. C. 85 (1937).

29. § 302(e).

30. Section 303(e) exempts: “transportation by contract carrier by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment, or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II.”

31. In the Motor Carrier Act “private carrier” is defined in § 203(a)(17).

32. Eastman, *supra* note 9, at 44.

certificates of exemption.³³ This special treatment of the private carrier can be explained either on the assumption that Congress did not believe their regulation was requisite to an adequate common carrier service³⁴ or that it believed that regulation of the private carrier would be unconstitutional.³⁵

As the Commission in dealing with the whole transportation system is to be concerned only with those water carriers which substantially compete with railroads and motor carriers, the Act excepts all carriers which are clearly non-competitive. Hence, transportation by contract or common carriers of liquid cargoes in bulk in tank vessels,³⁶ transportation by common or contract carrier of not more than three unwrapped bulk commodities,³⁷ and transportation by contract carriers on the Great Lakes of the same number of bulk commodities³⁸—all are absolutely exempted from the provisions of the Act. These exemptions are based on the assumption that the cost of shipping commodities such as petroleum, iron ore, limestone, and grain is so much cheaper by water than by rail or motor that no competitive questions could possibly arise.³⁹ Nevertheless, unless the Commission is circumspect, these presumably justifiable exemptions may be subjected to abuse by ingenious carriers.⁴⁰

In addition to these functional exemptions there are several discretionary exemptions of a miscellaneous nature. The Commission may except from any part of the Act common or contract carriers which, if regulated, would be obliged to compete at a disadvantage with foreign water carriers—a provision primarily directed at the Canadian freighters on the Great Lakes.⁴¹ Again, the Commission is empowered to exclude from the operation of the Act transportation within the limits of a single harbor,⁴² transportation by

33. § 303(h).

34. This was not discussed in the Congressional debates on the Act.

35. Senator Wheeler expressed this opinion in the Senate debate on the Act. 84 CONG. REC. 5871 (1939). See *Frost Trucking Co. v. Railroad Comm'n*, 271 U. S. 583, 592 (1926) and *Michigan Comm'n v. Duke*, 266 U. S. 570, 577 (1925) for the proposition that a private carrier cannot be converted into a common carrier by mere legislative fiat.

36. § 303(d).

37. § 303(b). But the subsection is specifically made inapplicable to bulk freight shipments subject to the Intercoastal Shipping Act of 1933.

38. § 303(c). Whereas the bulk commodities named in § 303(b) must be of a kind "delivered by the carrier without transportation mark or count" and "without wrappers of containers," these specifications are not added to § 303(c).

39. See *Hearings before Committee on Interstate and Foreign Commerce, on H. R. 2531*, 76th Cong., 1st Sess. (1939) 1675. But in some sections railroads do compete with shipments of petroleum by water. See *Gasoline & Kerosene to River Ports in Alabama*, 229 I. C. C. 509 (1938); *Petroleum between California, Oregon, & Nevada*, 219 I. C. C. 789 (1937).

40. See *Hearings before Committee on Interstate and Foreign Commerce on H. R. 2531*, 76th Cong., 1st Sess. (1939) 1134-1135.

41. § 304(d). See 84 CONG. REC. 5885-6 (1939).

42. § 303(g)(1).

small craft, by vessels carrying not more than sixteen passengers, and by ferries, and the operation of contractor's equipment and salvors.⁴³

Control of the Quantity of Competitive Services. For years one of the major weaknesses in the water transportation industry has been the over-tonnaging of parts of the trade. In the intercoastal trade, for example, the sale of government-built freighters after the war impaired the economic condition of the industry.⁴⁴ Moreover, the Shipping Board had no power to control the number of carriers engaging in these trades, and the Board had refused to permit the carriers to incorporate in their conference agreements restrictions against the admission of newcomers to the trades.⁴⁵ The carriers therefore had no choice but to try to hold their business by undercutting new competitors. In vesting the Interstate Commerce Commission with power to handle the problem of overtonnaging, Congress has sought not only to promote the economic well-being of existent carriers in the industry, but also, by curtailing the operation of private and contract carriers, to protect common carriers from discriminatory practices at their hands.

Section 309(a) makes it illegal for a common carrier to engage in water transportation unless it first obtains a certificate of public convenience and necessity from the Commission. A "grandfather clause"⁴⁶ enables a carrier which has been in *bona fide* operation since January 1, 1940, to obtain a certificate without proof of its eligibility to perform a public service or of its indispensability to the shipping public. But to meet the eligibility requirement,⁴⁷ a new common carrier applicant will have to demonstrate both an adequacy of facilities and a willingness to perform its common law duty of meeting all reasonable requests for service at reasonable rates; to show indispensability⁴⁸ he will probably have the burden of proving that present rail, motor and water service falls short of the public needs which are to be satisfied by his proposed services.⁴⁹ Even if the applicant measures up to these standards, he is not assured a certificate *carte blanche*, for it is within the province of the Commission to specify his routes and, with certain enumerated exceptions, to place upon his operations other "reasonable" limitations.⁵⁰

Instead of proving "public convenience and necessity," the contract carrier applying for a permit must demonstrate that his proposed operations will be "consistent with the public interest and the national transportation policy"

43. § 303(g) (2).

44. See 84 CONG. REC. 6147 (1939).

45. See *In the Matter of Gulf Intercoastal Conference Agreement*, 1 U. S. S. B. B. 322 (1934).

46. § 309(a).

47. § 309(c).

48. *Ibid.*

49. This is the standard which has been used in the administration of the Motor Carrier Act. See *Norton Common Carrier Application*, 1 M. C. C. 114 (1936). But see *Bowles Common Carrier Application*, 1 M. C. C. 589 (1937).

50. § 309(d).

of the Act⁵¹—a standard construed in the administration of the Motor Carrier Act as confining the contract carrier's function to those specialized services required by the peculiar needs of the shipping public which common carriage is unable to meet.⁵² Presumably, in view of the "National Transportation Policy," the "inherent advantages" of contract carriage—the ability to handle large shipments at unscheduled times—will be given due consideration. Again, as in the case of the common carrier, the Commission can with certain exceptions determine the scope of the business of the contract carrier, and delimit its operations so as to make the position of the common carrier impregnable.⁵³

To prevent discrimination against shippers of similar commodities between the same points and also to forestall the evasion of applicable tariffs, the Act forbids a carrier to hold simultaneously both a certificate as a common carrier and a permit as a contract carrier.⁵⁴ This ban on "dual operations" has been vigorously protested by leaders in the industry as contrary to the established custom of a common carrier to fill its excess capacity with contract orders, and of contract carriers to perform occasional common carrier services.⁵⁵ Recognition of this custom led the Conference Committee to add a clause empowering the Commission to relieve carriers from the operation of this prohibition if "the public interest and the national transportation policy" will not suffer.⁵⁶ Practice under the Motor Carrier Act, which contains a similar "escape" clause,⁵⁷ indicates that the Commission will be likely to permit dual operations only where the two operations appear not to be substantially competitive, *i.e.*, where they do not reach the same class of shippers,⁵⁸ serve the same points,⁵⁹ or involve the same type of goods.⁶⁰

The Act as first drafted would have prohibited a private carrier from conducting common or contract operations.⁶¹ This provision, however, was eliminated in Committee—leaving the Commission discretion to treat the problem in the light of the "National Transportation Policy." In the *Geraci*

51. § 309(g).

52. See the concurring opinion of Chairman Eastman in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 475, 496 (1939).

53. § 309(g).

54. § 310.

55. It was the contention of the water carriers that this ban on "dual operations" would destroy the paramount advantage of water transportation to shippers: the flexibility and variety of services it can offer. See *Hearings before Committee on Interstate and Foreign Commerce on H. R. 2531*, 76th Cong., 1st Sess. (1939) 1128, 1338; Eastman, *supra* note 9, at 7, 12.

56. § 310.

57. Motor Carrier Act, § 210.

58. See *Nelson Extensions of Operations*, 1 M. C. C. 285 (1936).

59. See *Wade Common Carrier Application*, 1 Federal Carriers Cases ¶ 7469 (1940).

60. See *Transcontinental Contract Carriers Contract Carrier Application*, 18 M. C. C. 261 (1939).

61. Eastman, *supra* note 9, at 44.

case⁶² arising under the Motor Carrier Act the Commission felt compelled by some of the language now incorporated in this "policy" to prohibit absolutely for-hire operations by a private carrier. It based its decision on the ground that such a mixture of operations would give the private carrier an undue advantage over common and contract carriage. While the advantage the private carrier enjoys because it can operate on a low overhead made possible by an assured traffic obtained without solicitation expense is counter-balanced by the disadvantage that it suffers through its inability to fill its return load, it was reasoned in the *Geraci* case that the private carrier could overcome this disadvantage by operating as a for-hire carrier on its return trip; and that the ability of private carriage thus to compete on better than even terms with regular for-hire carriage would undoubtedly invite traffic diversion from both common and contract carriage. Such a result, the Commission felt, would be contrary to the spirit of the Congressional policy of promoting "adequate, economical and efficient service" and of fostering "sound economic conditions in transportation" among the several carriers. Yet, since such a mixture of operations has for long been the accepted custom in sections of the water transportation industry,⁶³ it is evident that an invocation of the *Geraci* rule by the Commission will demonstrate its clear purpose to weight the scales in favor of for-hire carriage.

Power Over Rates. While a surplus of competitive facilities is one cause of the depressed state of sections of the water transportation industry, destructive trade practices have unquestionably been the chief source of trouble. Efforts at price stabilization in the intercoastal trade by means of conference agreements have failed because carriers within and without the conference have resorted to secret rebating and other forms of discrimination, inevitably culminating in open rate wars.⁶⁴ One result of these competitive struggles has been a weakening of the position of the common carrier upon whom the public must depend; in fact, the vicious rate-slashing policies of private and contract carriers have all but driven the common carrier from parts of the industry.⁶⁵ Moreover, the resulting instability of rates has been inimical to the interests of shippers who have been unable to ascertain what their competitors were paying for their transportation services, since all rates were not published.⁶⁶

62. *Geraci Contract Carrier Application*, 7 M. C. C. 369 (1938).

63. See note 55 *supra*.

64. See note 5 *supra*.

65. See Eastman, *supra* note 14, at 14. The common carrier is overshadowed by the contract and private carriers in many parts of the trade. In 1932 common carriage accounted for 31% of the traffic on the Mississippi river, but only 3.6% on the Ohio river and less than 5% on the Great Lakes. In the intercoastal trade, however, 90% of the traffic, other than tanker traffic, is handled by common carriers. Eastman, *supra* note 9, at 7-8.

66. See Eastman, *supra* note 9, at 11.

In order to protect the shipping public, the Act gives the Commission plenary rate powers over common carriage. Every common carrier must file with the Commission and print for public inspection the exact charges for all items, and must rigidly adhere to these charges.⁶⁷ The Commission may suspend these rates when it sees fit, and prescribe the exact rates, or the maximum or minimum, whenever it finds the prevailing rates either unreasonable or discriminatory to shippers.⁶⁸ By requiring the common carrier to give the public thirty days' notice prior to a rate change, the Commission also is able to prevent unexpected fluctuations in charges.⁶⁹ While rebates and discriminations among shippers are outlawed,⁷⁰ only those shippers dependent on such carrier services as had previously been regulated may claim reparations, and the same procedural methods are available as to shippers by rail.⁷¹ Carriers may not prejudice shippers at intermediate points on a route by charging less for the whole haul than for any part thereof.⁷² Finally, for the numerous shippers who require through rail and water service, the Act strengthens the Commission's control over through routes and joint rates by adding to its present powers minimum rate power over the water carrier's division of the charge.⁷³

Though such an array of controls seems quite adequate to protect the shipper's interest, their ultimate effectiveness depends primarily on the economic stability of the common carrier. To insure the economic health of common carriage, the Act enables the Commission to regulate to a limited degree the rate-making policies of regulated contract carriers. Every contract carrier must establish and observe reasonable minimum charges;⁷⁴ the Commission may require the contract carrier to file copies of its actual contracts, which the Commission may make public in the event the carrier violates the schedule of minimum rates on file with the Commission.⁷⁵ The Commission has power to alter these minimum charges in the light of the "National Transportation Policy," but the rates so prescribed must not give the contract carrier any undue advantage over competing common carriers.⁷⁶ These pro-

67. § 306(a) and (c).

68. § 307(b) and (g).

69. § 306(d).

70. § 306(c).

71. § 308. Evidently Congress felt that to put liability for reparations on the newly regulated water carriers would be inadvisable. The Motor Carrier Act makes no provision for reparations. See MACLEAY, *REGULATION OF WATER CARRIERS* (1940) 24.

72. This is the long-and-short haul clause, § 4 of the Interstate Commerce Act, which the present Act amends to embrace water carriers by § 6 of Title I.

73. § 307(d). Previously the Commission had power only to fix maximum rates for the water carrier's division of the charge. See 49TH ANN. REP. ICC (1935) 34, where the Commission recommended that it be granted this minimum rate power to effect stability in the rate adjustments maintained by the several carriers.

74. § 306(e).

75. § 313(b).

76. § 307(h).

visions appear to evidence a clear Congressional intent to prevent contract carriers from demoralizing common carrier service by the device of drastic rate reductions.

In addition to fortifying the position of the common carrier, the minimum rate power serves as the Commission's main instrument for adjusting the conflicting interests among the several forms of transportation. That the Commission, at the instigation of the railroads, might employ these powers to equate water rates with rail rates was a fear frequently voiced while the Act was being debated.⁷⁷ To obviate this possibility, the water carriers persuaded the legislators to write into the Act several specific safeguards. One is the clause in the "National Transportation Policy" which instructs the Commission to regulate all modes of transportation so as to "recognize and preserve the inherent advantages of each." Thus, in a case where the railroads want to reduce their rates to the level of the water carrier rates, although the rail transportation is clearly more costly than water carriage, presumably the Commission should deny the proposed reduction.⁷⁸ A second safeguard is found in the water carrier rate-making rule, which requires the Commission to consider *inter alia* "the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed."⁷⁹ That is, the Commission must not set a minimum rate so high that the for-hire water carrier will lose its business either to the railroads or to private water carriers, always a potential substitute form of carriage within the industry. This restraint is considerably reinforced by the last sentence of the rate-making rule which recognizes the water carriers' need of sufficient revenues to provide an adequate and efficient service.⁸⁰ As a final protection, the water carrier interests had a proviso inserted into the "no discrimination" subsection stating that differences in rates of a water carrier from those of a rail carrier should not be deemed to constitute discrimination within the meaning of the Act.⁸¹

Although the Act lays down these broad policy considerations as a guide, the Commission must itself establish the economic formulae for the determination of minimum rates. If previous regulation of water carrier rates by the Commission and other governmental agencies is any criterion, such formulae are more likely to be common-sensical than scientific. For instance, the rule of thumb the Commission has used to set joint water-rail rates in competition

77. See 84 CONG. REC. 6136 (1939).

78. Of course this statement is based on the assumption that both the competing water and rail carriers are operating on a full-cost basis. If the water carrier is operating below full-cost it may be necessary to permit the rail carrier to reduce its rate correspondingly. For a discussion of the several schools of thought on the question, see 53D ANN. REP. ICC (1939) 27-28.

79. § 307(f). See the statement of Senator Wheeler in 84 CONG. REC. 5873 (1939).

80. § 307(f).

81. § 305(c). See 86 CONG. REC., Sept. 6, 1940, at 17618.

with all-rail rates is a twenty per cent differential, subject to diminution to as little as ten per cent depending upon the circuitry of the water-rail route.⁸² But the Commission has not pretended to assert the scientific accuracy of this differential.⁸³ If the Commission desired to fix a minimum rate on a cost basis in a rate controversy, however, it probably would choose as a minimum a slight margin over "out-of-pocket costs"—the basis it has approved in railroad rate-making.⁸⁴ In administering the Motor Carrier Act, the greater potential dangers of this "out-of-pocket costs" theory for motor carriers than for railroads by reason of the greater number of operators involved has been recognized.⁸⁵ This condition also applies to the water transportation industry; fairness, however, would seem to require the Commission, should it continue to allow the railroads to apply this theory, to give the water carriers equal leeway. Ideally, "full costs" would be the most desirable minimum rate formula, since it would benefit the public by promoting that mode of transportation which could operate at the lowest unit cost; practical considerations, however, such as the difficulty of ascertaining costs and the inadvisability of abandoning existing facilities, stand in the way of realizing this ideal in the near future.⁸⁶

Because maximum rate-making has a much older tradition behind it than minimum rate making,⁸⁷ the Commission will have a plethora of theories upon which to draw in establishing maximum rates for common carriage. A stipulation in the Act which prohibits the Commission from considering good will, earning power or the worth of the operating certificate in evaluating the carrier's property,⁸⁸ implies that Congress anticipated the use of the *Smyth v. Ames* rule,⁸⁹ of a fair return based on valuation, in the establishment of maximum rates. Failure to find a successful method of evaluating rail property may, however, militate against any similar attempt in water carrier regulation.⁹⁰ It seems more probable that the Commission will lean

82. See LOCKLIN, *ECONOMICS OF TRANSPORTATION* (1938) 740.

83. This differential of 20% in favor of the water carrier is not based on cost of service but on a belief that such a differential is necessary in order to attract any traffic to the barge lines. See LOCKLIN, *op. cit. supra* note 82, at 740. Similarly, the blanket minimum rate order the Maritime Commission set in the 1940 Intercoastal Rate Structure Investigation was not based on anything more objective than the generally demoralized state of the industry. 2 U. S. M. C. 285 (1940).

84. See 53D ANN. REP. ICC (1939) 26.

85. See Refrigerator Material from Memphis to Dayton, 4 M. C. C. 187, 189 (1938).

86. Chairman Eastman testified that "full costs" was the ideal standard toward which the Commission should strive. *Hearings before Committee on Interstate & Foreign Commerce on H. R. 2531*, 76th Cong., 1st Sess. (1939) 1710-1711.

87. The Commission did not receive control over minimum rates until the enactment of the Transportation Act of 1920, 41 STAT. 485 (1920), 49 U. S. C. § 15(1) (1934).

88. § 307(c). The same subsection is included in the Motor Carrier Act in § 216(h). See Comment (1936) 36 COL. L. REV. 945, 962.

89. 169 U. S. 466 (1898).

90. See HEALY, *THE ECONOMICS OF TRANSPORTATION* (1940) 541.

upon the more convenient tests of how valuable the service is to the shipper,⁹¹ how the proposed rate compares with prevailing water rates on comparable commodities,⁹² and—a special consideration in water carrier regulation—how much space is available aboard the carrier for shipping the commodity in question.⁹³ Furthermore, consideration, on the one hand, of whether the proposed rate will enable the shipper to reach his market⁹⁴ and, on the other hand, of whether the rate is justified in view of increases in costs of labor, fuel and other items, will also carry weight in the final determination.⁹⁵ All these criteria have been so thoroughly intermixed in rate-making cases, that it is impossible to guess which will take precedence in the establishment of maximum rate structures for common carriage by water.

Auxiliary Powers. In order to implement its powers, the Commission is authorized to regulate the financial practices of water carriers subject to the Act. It can investigate the problems of common management and control and recommend remedial legislation to Congress.⁹⁶ It has full authority over consolidations, mergers, acquisitions, and pooling agreements entered into by water carriers.⁹⁷ In fact, the Act endows the Commission with all the financial powers it has over railroads except control over the issuance of securities.⁹⁸

A second set of ancillary powers granted to the Commission relates to accounting practices which have seldom been regularized in the water carrier industry.⁹⁹ Under the Act the Commission can require annual, periodical and special reports,¹⁰⁰ prescribe a uniform system of accounts,¹⁰¹ prescribe forms for all records and memoranda and the length of time they must be preserved,¹⁰² classify property for depreciation purposes and establish depreciation rates.¹⁰³

91. This is one of the tests the Shipping Board and its successors have employed. See *Eastbound Intercoastal Lumber*, 1 U. S. M. C. 608 (1936). See Edgerton, *Value of the Service as a Factor in Rate Making* (1919) 32 HARV. L. REV. 516.

92. See *Eastbound Intercoastal Lumber*, 1 U. S. M. C. 608 (1936).

93. See *Heller v. Eastern Steamship Lines, Inc.*, 1 U. S. S. B. 158 (1929).

94. See *Eastbound Intercoastal Lumber*, 1 U. S. M. C. 608 (1936). See LOCKLIN, *ECONOMICS OF TRANSPORTATION* (1938) 731.

95. See *Commodity Rates between Atlantic & Gulf Ports*, 1 U. S. M. C. 642 (1937).

96. § 304(b).

97. § 7 of Title I of the Act, amending § 5 of the Interstate Commerce Act.

98. See p. 668 *infra*.

99. The accounts used by those carriers which entered into joint rail-and-water rates were prescribed by the Commission. *Interstate Commerce Act*, 24 STAT. 386 (1887), 49 U. S. C. § 20(1) (1934).

100. § 313(a).

101. § 313(c).

102. § 313(e) and (g).

103. § 313(d).

The Act also contains the usual penal and enforcement powers.¹⁰⁴ Fines as high as \$5,000 are provided for willful violations of the mandatory sections of the Act, and the Commission is entrusted with all the necessary instruments of administration. It has power to designate agents for the service of notices and orders, and to suspend, modify or set aside its own orders.¹⁰⁵

Conclusions. Early drafts of the Act recommended abandoning the policy of government subsidization of water transportation; they provided for the assessment of tolls to cover the costs of inland waterway improvements¹⁰⁶ and for the sale of the government-owned barge lines operating on the Mississippi and Warrior rivers.¹⁰⁷ Moreover one of the duties of the new Board of Investigation¹⁰⁸ for which the Act provides is to recommend legislation on the question of subsidization. It is thus possible that water carriers may eventually be made to operate on a full cost basis. However, since each transportation industry has received government aid early in its history, it seems fair to adjust any system of tolls to cover only future and not past improvement and maintenance costs.¹⁰⁹ These costs in turn should be adjusted to exclude charges attributable to flood-control and other non-navigation purposes.¹¹⁰ Though outright sale of the federal barge lines may be neither practical nor desirable,¹¹¹ they should not be permitted to continue operation at a deficit.¹¹² If public subsidization of railroads and motor carriers is treated in like manner, the abandonment of water carrier subsidies might tend to put inter-carrier competition on a more equitable cost basis.

104. § 317.

105. § 315.

106. Title III of H. R. 2531, 76th Cong., 1st Sess. (1939).

107. See H. R. REP. NO. 1985, 72d Cong., 2d Sess. (1933) (Shannon Committee's report recommending discontinuance of the lines. See *Hearings before Committee on Interstate and Foreign Commerce on H. R. 2531*, 76th Cong., 1st Sess. (1939) 1527).

108. Section 301 of Title III of the Act establishes a board of investigation, composed of three members appointed by the President, to investigate the whole transportation problem.

109. The railroads were heavily subsidized by public grants of land during the nineteenth century. See 1 *PUBLIC AIDS TO TRANSPORTATION*, (Fed. Coord. of Transp. 1940) 12-13.

110. *Id.* at 55.

111. The Federal Barge Lines were built during the World War to meet the shortage of transportation facilities. Reorganized as the Inland Waterways Corporation in 1924, they were meant to continue under government operation until an adequate private common carrier service was established on the Mississippi and Warrior rivers. Even assuming that such a service has been established, it is doubtful whether private interests would be willing to take over the lines except at a "bargain price." *Id.* at 22, 59-60.

112. In the period 1924-35 the Inland Waterways Corporation, viewed as a continuing Government enterprise, incurred a corporate deficit of \$8,945,907; viewed as a private enterprise, a deficit of \$14,727,466. On either basis the deficit has increased considerably since 1935. *Id.* at 59.